A

SUBRAMANIAM GOPAL

v.

G SANTHIRASEGARAM GOPAL & ORS

B

HIGH COURT MALAYA, KUALA LUMPUR
KAMALUDIN MD SAID JC
[CIVIL SUIT NO: 22-472-2010]
20 AUGUST 2013

C ***CIVIL PROCEDURE:*** *Action - Cause of action - Whether deceased person could be sued - Whether descendent could be regarded as party to suit - Whether suit commenced against estate of deceased - Failure to comply with O. 15 r. 6A(4) Rules of the High Court 1980 - Whether suit against deceased and estate of deceased nullity*

D ***SUCCESSION:*** *Administration - Sale of land - Plaintiff held 1/2 shares - Whether plaintiff could sell property when defendants had minority undivided shares in property*

E The plaintiff sought for, *inter alia,* an order that property 1 be sold *vide* a private agreement or a public auction and that the plaintiff be given an opportunity to purchase property 1 and 2. The plaintiff was the administrator of his late mother's estate and based on the equal distribution amongst the brothers and sister, each would get 1/6 shares of the property including the plaintiff. The first defendant had passed away and his estates were not represented in court. The court instructed
F the plaintiff to have the deceased name substituted with the estates of the deceased. However, the plaintiff proceeded on the grounds that the plaintiff's 1/6 shares out of his mother's estates was undisputed. Further, the plaintiff failed to comply with the mandatory provisions of O. 15 r. 6A(4) of the Rules of the High Court 1980 ('RHC').
G Therefore, the defendants cited the case of *Wendover Financial Services v. Ridgeway* ('*Wendover*') and submitted that the suit against the first defendant was a nullity since a dead person could not be sued in law and a descendent could not be regarded as a party to the suit. The defendant further argued that even if the suit commenced against the
H first defendant who was deceased, it would be treated as having been commenced against his estate. Proceeding to trial with the suit against the first defendant without compliance of O. 15 r. 6A(4) of the RHC rendered the proceedings to run counter to a point of substantive law, namely that an action could not be maintained against the estate of the
I deceased person in the absence of the extraction of letters of administration. Thus, the defendants submitted that the plaintiff did not have a legal basis to make the claim and the failure of the plaintiff to substitute the first defendant in these proceedings was fatal to the

plaintiff's claim. The plaintiff, prior to the commencement of the hearing of the suit, informed the court that he was withdrawing the claim against the first defendant and the defendants had no objection to this. The plaintiff impressed upon the court that any order made would not prejudice the estate of the deceased as the first defendant's entitlement to the proceeds of sale would be paid to the first defendant's estate and if letters of administration had yet to be applied, then the proceeds of sale could be paid to the Public Trustee Bhd. Further, the plaintiff argued that the family of the first defendant was fully aware of the current proceedings but had taken no steps to appoint solicitors or intervene in the suit. The plaintiff argued that *Wendover*'s case did not apply as the plaintiff in the present case did not proceed against the first defendant but proceeded against the second to the fifth defendants. The plaintiff had further valued the price of the property at RM380,000 and was ready to sell his 7/12 shares at the price of RM230,000 or purchase the defendants shares at the price of RM28,000 for each shares. On the contrary, the defendants disputed the plaintiff's ownership of the 1/2 shares and alleged that the plaintiff was the trustee of all the defendants. It was further alleged that the payment of the said property was paid by their late mother using the compensation money of their late father and also from the salaries of the plaintiff, the first defendant and the third defendant. Thus, the house was a family house. The issues that arose for determination, *inter alia,* were: (i) whether the plaintiff could sell property 1 by himself when the other defendants had minority undivided shares in the same property; and (ii) whether the 1/2 shares registered under the plaintiff's name in property 1 was held in trust for the defendants.

Held (dismissing plaintiff's claim with costs):

(1) The first defendant had been notified of the hearing but chose to do nothing. The solicitors for the second, third, fourth and fifth defendants also represented the deceased and was in a position to advise the deceased family as to their rights. Therefore, it could not be accepted as an exception to the established rule that the dead person could not be sued (*Wendover*'s case). Even if the plaintiff, prior to the commencement of the hearing of the suit withdrew his claim against the first defendant, the plaintiff in the trial must also prove his case of indefeasibility of title against the first defendant since property 1 was held in undivided shares. (paras 22 & 23)

(2) Order 15 r. 6A of the RHC was to provide a remedy where there was no person in law who could be sued. It was therefore superfluous to state that even where no grant of probate or of administration had been made to the estate of a deceased person,

A O. 15 r. 6A would have no application if there was in law a person who could be sued. Although the plaintiff contended that the interest of the first defendant was fully protected as the proceeds of sale would be paid to the first defendant's estate or to the Public Trustee Bhd, the non-compliance of O. 15 r. 6A(4) of the RHC was not a B mere irregularity but it ran counter to a point of substantive law to which the court was bound to give effect. Thus, if an action was from the very beginning a nullity, adjudication of that sort was impossible or a non-starter. (paras 33 & 43)

C **(3)** The defendants' pleadings did not state that registration was obtained by unlawful means or fraud. Hence, the 1/2 shares owned by the plaintiff was undisputed. Therefore, the allegations that the plaintiff's 1/2 shares in the said property was held on trust of the defendants could not hold water. The allegation by the defendants that the property was bought by using the compensation money of their late D farther was not supported by any sufficient evidence. The plaintiff's evidence was cogent as he had a fixed job and did some temporary jobs and earned RM3,000 per month. Thus, it was most likely that the plaintiff was the one who had paid for the housing loans to the bank. There were sufficient evidence to support that the house was E bought under the plaintiff's name and his late mother. (paras 65, 67-70)

(4) The plaintiff proved his claim that the 1/2 shares in the property belonged to him and the other 1/2 shares which was under the deceased mother's name was the estates' property which was bound F to be distributed equally amongst the defendants and the plaintiff. The plaintiff eventually would own 7/12 shares in the said property and being the holder of the largest shares, the plaintiff should not be prevented from occupying the house or deprive him of the use of his 1/2 shares and 1/6 shares from his late mother's estate. (para G 78)

Case(s) referred to:

Affin Bank Berhad v. Pau Wah Tradings Sdn Bhd (Civil Suit No 22-159-2008) HC ***(dist)***

Cahaya Ideal (M) Sdn Bhd v. Orang-Orang Yang Mengenali Diri Sebagai 'Ponga' & Ors [1999] 3 CLJ 257 HC ***(refd)*** H

Dato Seri Anwar Ibrahim v. Tun Dr Mahathir Mohamad [2011] 1 CLJ 1 FC ***(refd)***

Kerajaan Malaysia v. Yong Siew Choon [2005] 4 CLJ 537 FC ***(refd)***

Pathma Naganather & Anor v. Nivedita Nagather (No. 1) [2003] 8 CLJ 457 HC ***(refd)***

See Hong Chen & Sons Sdn Bhd & Ors v. M Kayveas [2011] 1 LNS 1732 CA ***(refd)*** I

Sri Alam Sdn Bhd v. Rasa Rata Sdn Bhd [2011] 1 LNS 804 HC ***(refd)***

Tay Choo Foo v. Tengku Mohd Saad Tengku Mansur & Ors and another Appeal [2009] 2 CLJ 363 CA ***(dist)***
Teh Bee v. K Maruthamuthu [1977] 1 LNS 134 FC ***(refd)***
Wendover Financial Services v. Ridgeway 2012 NY Slip Op 01884 (NY App Fourth Dept 2012) ***(refd)***
Wong Yew Kwan v. Wong Yu Ke & Anor [2010] 2 CLJ 703 CA ***(refd)***
Yap Miew Sang v. Ng Lee Lee [2009] 9 CLJ 304 HC ***(refd)***
Yeong Ah Chee v. Lee Chong Hai & Anor And Other Appeals [1994] 3 CLJ 20 SC ***(refd)***
Yong Siew Choon v. Kerajaan Malaysia [2003] 2 CLJ 106 CA ***(foll)***

Legislation referred to:
National Land Code, s. 320(1), s. 340(2)
Rules of Court 2012, O. 15 r. 6A(1), (2), (4)(a)
Rules of the High Court 1980, O. 15 r. 6A(1), (4)

For the plaintiff - Rajinder Singh; M/s Rajinder Singh Veriah & Co
For the defendants - Suresh Thanabalasingam; M/s Suresh Thanabalasingam

Reported by Sandra Gabriel

JUDGMENT

Kamaludin Md Said JC:

Background

[1] In this case the plaintiff is seeking for:

(i) An order that property held under Geran HS (D) 11993 PT No 990, Mukim Ampang, Daerah Kuala Lumpur at No. 12, Jalan Pertiwi, Taman Maluri, Cheras, 55100, Kuala Lumpur be sold through a private agreement or a public auction;

(ii) An order that property held Geran PM 110 Lot 2751, Mukim Ampang, Daerah Kuala Lumpur at No 116, Lorong 6, Kg Pandan, 55100, Kuala Lumpur be sold through a private agreement or a public auction;

(iii) A valuer to be appointed to prepare the valuation of property 1 and property 2;

(iv) That the plaintiff be given an opportunity to purchase property 1 and 2; and

(v) Third, fourth and fifth defendant to be ordered to give full and frank statement of rentals collected by them on first and second property.

[2] At the outset, the court was informed that parties are not proceeding with the property in prayer (ii) ("property 2") and also in respect of prayer (v) on statement of rentals collected on property 2. Therefore for the purpose of this trial this court is only concerned with property 1 and prayer (v) on statement of rentals collected on property 1 and prayer (iii) that a valuer is to be appointed to prepare the valuation of property 1.

Trial

[3] Documents to be used in this trial had been marked as follows:

(i) Bundle of pleadings-A

(ii) Common bundle of documents-B1

(iii) Additional common bundle of documents-B2

(iv) Plaintiff's bundle of documents-B3

(v) Statement of agreed issues to be tried-C

(vi) Statements of agreed facts-D

(vii) Plaintiff's case summary-E

(viii) Defendants' case summary-F

Issues

Whether the plaintiff can proceed with his claim without substituting the deceased first defendant?

[4] At the outset of the trial, this court was informed that the first defendant, G Santhirasegaram a/l Gopal was not represented. He has passed away. His estates were also not represented in court. Parties were not aware if letters of administration has been taken out by the deceased next of kin. Mr Suresh who was originally acted for the first defendant informed the court that his service was terminated upon the death of the first defendant. The court then informed the plaintiff's solicitor, Mr Rajinder Singh to take the necessary action to have the deceased name substituted with the estates of the deceased. However the plaintiff's solicitor chose to proceed on grounds that the plaintiff's 1/6 shares out of his deceased mother's estates is undisputed and the issue of first defendant will be submitted in his submission. I have directed parties to submit on this issue.

[5] The defendant's solicitor in his submission after the trial has referred the court to the case of *Wendover Financial Services v. Ridgeway*, 2012 NY Slip Op 01884 (NY App 4th Dept 2012). In this case, the plaintiff Wendover brought a suit against Amelia C Donvito, then already deceased. Wendover later sought to amend its complaint to add the name of Jo-Ann Ridgeway, who had succeeded to Donvito's interests as the executrix of her estate. The appellate court found that the suit originally brought against a dead person was a nullity and that the suit could not therefore be amended to name the executrix or heir:

> We therefore conclude that "the action (against decedent) from its inception was a nullity (inasmuch as) it is well established that the dead cannot be sued" (*Marte v. Graber*, 58 AD3d 1, 3; see *Jordan v. City of New York*, 23 AD3d 436, 437; see also *Arbelaez v. Chun Kuei Wu*, 18 AD3d 583). Further, we conclude that the caption may not be properly amended pursuant to CPLR 305 (c). "That provision is under the rules generally used to correct an irregularity, for example where a plaintiff is made aware of a mistake in the defendant's name or the wrong name or wrong form is used" (*Marte*, 58 AD3d at 4). In the order appointing a referee, the court amended the caption of this action by "sticking the name of the defendant Amelia Donvito aka Amelia C Donvito ... and substituting in place thereof Jo-Ann Ridgeway as heir to the estate of Amelia Donvito aka Amelia C Donvito ..." Here, however, decedent was never a party for whom substitution could be effected pursuant to CPLR 1015 (a).

[6] Therefore, applying the principle of law as established in the case of *Wendover Financial Services v. Ridgeway*, 2012 NY Slip Op 01884 (NY App 4th Dept 2012) to the instant case, it was submitted that the suit herein against the first defendant is a nullity since a dead person cannot be sued in law and, a descendent could never be regarded as party to the suit. Attempt to allow the plaintiff to substitute was also refused by the plaintiff themselves.

[7] Therefore, it follows that evidence adduced by the plaintiff against the first defendant who is deceased, would not be receivable in law as it would offend the fundamental rules of natural justice.

[8] In the alternative, the defendant argues that even if the suit herein which was commenced against the first defendant who was deceased during the pursuance of the suit, is treated as having been commenced against his estate, proceeding to trial with the suit against the first defendant without prosecuting or complying with the mandatory provisions of O. 15 r. 6A(4) Rules of the High Court 1980 renders the proceedings not merely irregular but runs counter to a point of substantive law, namely, that an action cannot be maintained against the

estate of a deceased person in the absence of the extraction of letters of representation. It follows that the proceedings of the respondent's suit against the first defendant in the present instance is an illegality and therefore a nullity.

[9] Defendants' solicitor also referred to the case of *Yong Siew Choon v. Kerajaan Malaysia* [2003] 2 CLJ 106; [2003] 2 MLJ 150. In this case, an action was brought by the respondent against the appellant for sums outstanding as income tax. The respondent's claim was based on a notice of assessment for the year 1989. The relevant notice is addressed to "Yong Siew Choon wakil sah harta pusaka Abdul Hamid Tun Azmi" which on a contextual translation reads "Yong Siew Choon the representative of the Estate of Abdul Hamid Tun Azmi". The appellant was only the widow of Abdul Hamid Tun Azmi ("the deceased") but she was neither the executrix nor the administratrix of the deceased's estate and no letters of representation of any sort were applied for or taken out in respect of the deceased's estate. When the appellant failed to comply with the notice of assessment, the respondent issued a writ in which it cited the appellant again as "Yong Siew Choon Wakil Sah Harta Pusaka Abdul Hamid Tun Azmi" meaning that she was being sued as the representative of the deceased's estate. The respondent later did not do anything to comply with O. 15 r. 6A of the Rules of the High Court 1980. The Court of Appeal in holding that the respondent's suit in the present instance is in illegality and therefore nullity delivered the following reasoning:

> In the present case, the action was commenced in accordance with the permissive provision in O. 15 r. 6A(1). But it was prosecuted in defiance of the mandatory provisions of O. 15 r. 6A(4) which is the only provision that enables an action to be kept on foot. So, non-compliance of O. 15 r. 6A(4) is not a mere irregularity, it runs counter to a point of substantive law, namely, that an action cannot be maintained against the estate of a deceased person in the absence of the extraction of letters of representation. It follows that the respondent's suit in the present instance is an illegality and therefore a nullity. To summarize, the rule of substantive law is that an action may be commenced and maintained by or against the estate of a deceased after, and only after, letters of representation have been extracted. O. 15 r. 6A provides a very limited exception to that substantive rule by permitting the commencement of an action against the estate of a deceased even before the extraction of letters of representation. But it regulates the future prosecution of the action by requiring (in r. 6A(4)) certain steps to be taken in that respect and specifying the time limited for the taking of such steps. Failure to observe the terms of r. 6A(4) of O. 15 will therefore deprive a plaintiff of the beneficial effect of r. 6A and thereby activate the principal rule of substantive law governing such actions so as to render the action already commenced a nullity.

[10] In conclusion it was submitted that the plaintiff do not have a legal basis to make the claim as prayed in the statement of claim. Further failure of the plaintiff to substitute the first defendant in these proceedings is fatal to his claim and therefore the court shall dismiss the plaintiff's claim summarily.

Plaintiff's Reply

[11] In his submission, the plaintiff's solicitor stood by his contention that the defendant's solicitors at the commencement of the trial upon being questioned by this court had informed the court in no uncertain terms that he is not acting on behalf of the estate of the first defendant and that he had no authority to do so.

[12] Further he informed the court that the family of the first defendant had been duly notified of the hearing and chose to do nothing. In the circumstances, he had nothing to say to the court and left the matter to the discretion of the court. To add credence to what he told the court, he also agreed that the second property be sold and that the proceeds are divided and distributed as per the entitlement of each individual beneficiary.

[13] It is only when he finds that there is no defence to the plaintiff's claim that he chose to raise this issue and this issue was raised only in the defendant's submissions. This issue was never raised in the defence and neither was it raised in examination-in-chief nor in cross-examination. It is only when the defendants find themselves in a helpless position that they raise this non-issue in their submissions.

[14] The plaintiff through his solicitors prior to the commencement of the hearing of the suit informed this court that he was withdrawing his claim against the first defendant, and the defendant's solicitors raised no objection to this and the proceedings proceeded accordingly.

[15] It is the plaintiff's submission that the second defendant, third defendant, fourth defendant and fifth defendant cannot now object on behalf of the first defendant in these circumstances. The solicitors for the second, third, fourth and fifth defendants also represented the deceased and therefore were in a position to advise the deceased family as to their rights.

[16] The plaintiff's solicitor impressed upon the court that any order made by this court will not prejudice the estate of the first defendant. In the event of a sale, the first defendant's entitlement to the proceeds of sale will be paid to the first defendant's estate and if letters of administration have yet to be applied for, then the proceeds of sale can be paid to Public Trustee Bhd. The interest of the first defendant is fully

protected. Nothing in the order will remove, affect or prejudice the first defendant's entitlement to the first property and the second property. The property will be sold by way of public auction at a price to be determined by a recognized valuer and the question of the estate being prejudiced is a non-issue.

[17] Further, the family of the first defendant is fully aware of the current proceedings and has taken no steps to appoint solicitors or intervene in the present suit.

[18] This is clearly an afterthought on the part of the defendants. If this was a genuine issue, surely the defendant would have raised it before the hearing and not in their submissions.

[19] The plaintiff's solicitor argued that the case of *Wendover Financial Services v. Ridgeway* does not apply in these circumstances as the plaintiff here did not proceed against the first defendant but proceeded against the second, third, fourth and fifth defendants.

[20] The plaintiff prays for the plaintiff's claim to be allowed with costs.

Opinion Of The Court

[21] The issue raised here is on point of law and it must be allowed to be heard and determined. In *Dato Seri Anwar Ibrahim v. Tun Dr Mahathir Mohamad* [2011] 1 CLJ 1; [2011] 1 MLJ 145, the court allowed the preliminary objection to be raised although it was objected by the respondent's counsel. The Federal Court held that:

> Even though, the preliminary objection raised in that case goes to the issue of jurisdiction, the decision supports the principle that an issue of law may be raised at any stage of the proceedings with or without notice. The stand taken by the Court of Appeal found support in the case of *Lim Geak Liang v. East West UMI Insurance Bhd* [1997] 4 CLJ 405; [1997] 3 MLJ 517, a decision of the Federal Court, wherein Mohamed Dzaiddin FCJ (as he then was) at p. 521 stated:
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> > It is worth noting that this issue was never pleaded and argued in the courts below. At the outset of the proceedings, Cik Zachariah, counsel for the defendant, seized the opportunity by raising an objection that it was not open to the plaintiff to argue on appeal a fresh point not litigated and decided by the courts below. We overruled the objection upon the basis that since the ground of appeal concerned the construction of condition four of the policy; it is within our discretion to hear the argument of the parties. For this conclusion, we are guided by the decision of the Federal Court in *Gulwant Singh v. Abdul Khalik* [1965] 1 LNS 47; [1965] 2 MLJ 55 (per Thomson LP at p. 58 (MLJ):

> A point which is not raised at the trial and which is raised for the first time in the Court of Appeal must always be most jealously scrutinized (*The Tasmania* (1980) 15 App Cas 223 at p. 225). The question of whether effect should be given to such a point is, however, one for discretion (see *Ewa Perkowski v. Wellington Corporation* [1959] AC 53 at p. 69) and the principles on which that discretion may be exercised have been thus set out in the case of *Connecticut Fire Insurance Company v. Kavanagh* [1892] AC 473 at p. 480 (per Lord Watson):
>
> When a question of law is raised for the first time in a court of last resort, upon the construction of a document, or upon facts either admitted or proved beyond controversy, it is not only competent but expedient, in the interests of justice, to entertain the plea.

[22] Although it was contended that the family of the first defendant had been duly notified of the hearing and chose to do nothing and the defendant's solicitors raised no objection to the proceedings and the solicitors for the second, third, fourth and fifth defendants also represented the deceased and therefore were in a position to advise the deceased family as to their rights, in my opinion, it cannot be accepted as an exception to the established rule that the dead person cannot be sued. (See *Wendover Financial Services v. Ridgeway*, 2012 NY Slip Op 01884 (NY App 4th Dept 2012) where the appellate court found that the suit originally brought against a dead person was a nullity and that the suit could not therefore be amended to name the executrix or heir).

[23] Even if the plaintiff through his solicitors prior to the commencement of the hearing of the suit withdrew his claim against the first defendant, my opinion is that the plaintiff in the trial must also establish or prove its case of indefeasibility of title against the first defendant since property 1 is held in undivided shares.

[24] The trial has already concluded and any amendments to the statement of claim to substitute the deceased with the estate of a deceased would not be allowed.

[25] On the second property which was agreed to be sold and that the proceeds are divided and distributed as per the entitlement of each individual beneficiary, my opinion is that the established rule does not apply because the matter was settled before the trial commenced.

[26] In Malaysia, the law is trite that failure to observe the terms of r. 6A(4) of O. 15 will therefore deprive a plaintiff of the beneficial effect of r. 6A and thereby activate the principal rule of substantive law governing such actions so as to render the action already commenced a nullity (See *Yong Siew Choon v. Kerajaan Malaysia* [2003] 2 CLJ 106; [2003] 2 MLJ 150).

Order 15 Rule 6A(4) Of The Rules Of Court 2012

[27] In *Affin Bank Berhad v. Pau Wah Tradings Sdn Bhd & Anor Civil Suit No 22-159-2008* at the High Court in Malacca, I have in my judgment referred to the case of *Yong Siew Choon*.

[28] In that case, during trial, the first and the third defendants' solicitor raised another objection in respect of the plaintiff's suit against the second defendant, being the representatives of the deceased, Tan Leong Piow (wakil-wakil diri kepada Tan Leong Piow). Tan Leong Piow @ Tan Leong Tian had died on 24 October 2006. The plaintiff has filed this action against the second defendant on 29 August 2008. It is alleged by the first and the third defendants' solicitor that the plaintiff's suit against the second defendant cannot be maintained for non-compliance of O. 15 r. 6A(4) of the Rules of Court 2012.

[29] Order 15 r. 6A Rules of Court 2012 provides as follows:

> 6A. (1) Where any person against whom an action would have lain has died but the cause of action survives, the action may, if no grant of probate or administration has been made, be brought against the estate of the deceased.
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> (2) Without prejudice to the generality of paragraph (1), an action brought against 'the personal representatives of A B deceased' shall be treated, for the purposes of that paragraph, as having been brought against his estate.
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> (3) An action purporting to have been commenced against a person shall be treated, if he was dead at its commencement, as having been commenced against his estate in accordance with paragraph (1), whether or not a grant of probate or administration was made before its commencement.
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> (4) In any such action as is referred to in paragraph (1) or (3):
>
> (a) *The plaintiff shall, during the period of validity for service of the summons, apply to the court for an order appointing a person to represent the deceased's estate for the purpose of the proceedings or, if a grant of probate or administration has been made for an order that the personal representative of the deceased be made a party to the proceedings, and in either case for an order that the proceedings be carried on against the person appointed or, as the case may be, against the personal representative, as if he had been substituted for the estate;*
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> (b) The court may, at any stage of the proceedings and on such terms as it thinks just and either of its own motion or on application, make any such order as is mentioned in sub-paragraph (a) and allow such amendments (if any) to be made and make such other order as the court thinks necessary in order to ensure that all matters in dispute in the proceedings may be effectually and completely determined and adjudicated upon.

[30] It is submitted by the first and the third defendants' solicitor that he plaintiff had not complied with O. 15 r. 6A(4)(a) Rules of Court 2012 for failing to apply for a grant of probate or administration appointing a personal representative of the deceased to be made a party to the proceedings.

[31] The plaintiff's solicitor replied that the cause of action does not cease on the death of the deceased. The action may be brought against the estate of the deceased, where no grant of probate or administration has been made – O. 15 r. 6A(1) Rules of Court 2012. DW1 gave evidence that a grant of probate or administration had not been taken out in respect of the deceased's estate.

[32] Order 15 r. 6A(2) Rules of Court 2012 provides as follows:

> Without prejudice to the generality of paragraph (1), an action brought against "the personal representatives of A B deceased" shall be treated, for the purposes of that paragraph, as having been brought against his estate.

[33] The Federal Court in the case of *Kerajaan Malaysia v. Yong Siew Choon* [2005] 4 CLJ 537 held that the object of O. 15 r. 6A of the Rules is to provide a remedy where there is no person in law who can be sued. It is therefore superfluous to state that even where no grant of probate or of administration has been made to the estate of a deceased person O. 15 r. 6A will have no application if there is, in law, a person who can be sued.

[34] The third defendant is the wife of the deceased. It was submitted by the plaintiff's solicitors that all cause papers and notification of the trial have been served on the second defendant; however no representative of the deceased appeared in court. Neither did the third defendant.

[35] The first and the third defendants' solicitors submitted that the plaintiff failed to apply a grant of probate or administration within six months ie, "during the period of validity for service of the summons" under O. 15 r. 6A(4)(a) to do the following:

> (i) Appointing a person to represent the deceased's estate for the purpose of the proceedings, or;
>
> (ii) Appointing the Official Administrator when there is no administrator for the estates of Tan Leong Piow @ Tan Leong Tian, the deceased, under O. 15 r. 6A(5A) and s. 39 Probate and Administration Act, 1959.

[36] The plaintiff continued with this action against all the defendants, especially the second defendant, who is not a legal entity after six months from the date of filing (29 August 2008).

[37] The decision of the Court of Appeal in *Yong Siew Choon v. Kerajaan Malaysia* [2003] 2 CLJ 106; [2003] 2 MLJ 150 gives a clear direction on the applicability of O. 15 r. 6A(4) Rules of Court 2012. The Court of Appeal held that if O. 15 r. 6A(4) Rules of Court 2012 is not complied "It follows that the respondent's suit in the present instance is an illegality and therefore a nullity" (para. G p. 157):

> Failure to observe the terms of O. 15 r. 6A(4) of the RHC would therefore deprive a plaintiff of the beneficial effect of O. 15 r. 6A and thereby activate the principal rule of substantive law governing such action so as to **render the action already commenced a nullity**. (See held (1) at line I p. 150 and line A at p. 151 and line F/G p. 156). (emphasis added). It is said:
>
> > Returning to the present case, we would observe that the respondent was perfectly entitled (by reason of O. 15 r. 6A of the RHC) to commence the action in the manner intituled. But having done so, it did nothing else save to prosecute the action to judgment. In other words, there was blatant non-compliance with O. 15 r. 6A (4) of the RHC.

At line G/H at p. 156 as follows:

> It is our judgment that while O. 15 r. 6A of the RCH is a remedial provision of adjectival law, it is important that a litigant who seeks to take advantage of it **must comply with its terms before he or she may take advantage of any provision of substantive law.** (emphasis added)

And at line G at p. 157 as follows:

> In the present case, the action was commenced in accordance with the permissive provision in O. 15 r. 6A(1) of the RHC. *But it was prosecuted in defiance of the mandatory provision of O. 15 r. 6A(4) of the RHC which is the only provision that enables an action to be kept on foot. So, non-compliance of O. 15 r. 6A(4) of the RHC is not a mere irregularity, it runs counter to a point of substantive law, namely, that an action cannot be maintained against the estate of a deceased person in the absence of the extraction of letters of representation. It follows that the respondent's suit in the present instance is an illegality and therefore a nullity.*
> (emphasis added).

[38] On appeal, the Federal Court in *Kerajaan Malaysia v. Yong Siew Choon* [2005] 4 CLJ 537 says there can be no dispute that the judgment of the Court of Appeal is on excellent exegesis on O. 15 r. 6A. The Federal Court judgment did not say the decision of the Court of Appeal is wrong. It says only to the effect that "*there has been no analysis of its inapplicability to proceedings for the recovery of tax in the light of relevant provisions in the Act itself. Such a discourse may have resulted in a different conclusion*".

[39] In that case, it involved a tax matter where the Income Tax Act contains specific provisions in the Act to make the executors liable. The decision of the Federal Court is more peculiar to the facts in that case and where there has been an "executor" appointed to administer the estates of the deceased. Augustine Paul FCJ (as he then was) held that:

> **[10]** Thus, the object of O. 15 Rule 6A is to provide a remedy where there is no person in law who can be sued. It is therefore superfluous to state that even where no grant of probate or of administration has been made to the estate of a deceased person O. 15 r. 6A will have no application **if there is, in law, a person who can be sued. An executor de son tort is such a person.** As *The Law of Wills, Probate Administration and Succession in Malaysia and Singapore* by Mahinder Singh Sidhu says at p. 146:
>
> > When an executor has accepted office as an executor, he shall not thereafter renounce it. Acceptance does not mean only those executors appointed by the Court or authorised by the probate Court to serve in that capacity. It includes an executor de son tort who, without having been appointed executor, or without having taken out letters of administration, intermeddles with the goods of the deceased, or does any other act characteristics of the office of executor or administrator. he has all the liabilities and none of the office of executor (Coote v. Whittington [1873] LR 16 Eq 534).
>
> **[11]** In matters relating to the assessment and chargeability to tax of the estate of deceased persons there are specific provisions in the Act to make the executors liable. They are as 64(1) and 74(1) of the Act.

[40] In this instance case, the facts are different and very straight forward where there has been no letter of administration has been made for an order that the personal representative of the deceased be made a party to the proceedings. In *Pau Wah*'s case, the plaintiff has sued a personal representative to the deceased, Tan Leong Piow @ Tan Leong Tian. In the instance case the plaintiff sued the dead man without even naming a person who can be sued.

[41] The Federal Court's decision, does recognise executor *de son tort* ("a person" identified who intermeddles with the goods of the deceased, or does any other act characteristic of the office of executor or administrator) be made a party to a proceeding. However, in this instant case, there was none.

[42] I have stated in my judgment in *Pau Wah*'s case that the Court of Appeal decision is the law to be followed on the applicability of O. 15 r. 6A(4) and ruled that the plaintiff's action against the second defendant in that case is a nullity for having prosecuted its case in defiance of the mandatory provision of O. 15 r. 6A(4).

[43] In this case, it is the good intention of the plaintiff's solicitors that the proceeds of sale will be paid to the first defendant's estate and if letters of administration have yet to be applied for, then the proceeds of sale can be paid to Public Trustee Bhd and the interest of the first defendant is fully protected. With all due respect to the plaintiff's solicitors good intention, the non-compliance of O. 15 r. 6A(4) of the RHC is not a mere irregularity, it runs counter to a point of substantive law to which this court is bound to give effect. Thus, if an action is from the very beginning a nullity, adjudication of that sort is impossible or a non-starter so to speak.

[44] Since the main thrust of the plaintiff's case is to sell the first defendant's interest or proprietary rights unilaterally against the unknown wishes of the deceased first defendant, is not receivable in law. The plaintiff has failed to establish or prove its case of indefeasibility of title against the first defendant. From this it follows that the plaintiff would not also have a valid case against the remaining defendants since property 1 is held in undivided shares.

[45] Plaintiff's action against the defendants in this case is a nullity for having prosecuted its case in defiance of the mandatory provision of O. 15 r. 6A(4).

Whether The Plaintiff Can Seek To Sell Property 1 By Himself, When The Defendants Have Minority Undivided Shares In The Same Property

[46] The plaintiff's action against the defendants is a nullity. Had it not been declared as such, whether the plaintiff can seek to sell property 1?

[47] The defendant's solicitor submitted that it is trite law that owner of 1/6th share (as in this case) in the land, owns his 1/6 share in all part of the land.

[48] Further it was submitted that there are no provisions in law empowering the court the power or jurisdiction to order for sale of a land. The order for sale shall be in accordance with the provisions of the National Land Code.

[49] The similar issue was canvassed by Hishamudin Mohd Yunus J in *Yap Miew Sang v. Ng Lee Lee* [2009] 9 CLJ 304:

> There is also a further prayer of the defendant, and that is for an order that the terrace house is sold and the proceeds of sale be distributed equally between the plaintiff and the defendant. The defendant had caused a valuation to be carried out on the property on 28 January 2005. According to this valuation, as at this date the market value of the property was RM520,000.00.

This particular relief sought is based on para. 3 of the Schedule of the Courts of Judicature Act 1964. This para. 3 reads:

> 3. Partition of land
>
> Power to direct a sale instead of partition in any action for partition of land; and in any cause or matter relating to land, where it appears necessary or expedient, to order the land or any part thereof to be sold, and to give all necessary and consequential directions.

The learned counsel for the defendant conceded that the present action is not an action for the partition of land. However, learned counsel argues that the court nonetheless is vested with the power to make such an order based on the second limb of the paragraph that reads:

> ... and in any cause or matter relating to land, where it appears necessary or expedient, to order the land or any part thereof to be sold, and to give all necessary and consequential directions.

Assuming for a moment that I have such a power, the question that needs to be asked is: what is the reason for the defendant asking for such a relief? It would appear that the reason for seeking the sale order is the same as the reason for seeking an order to compel the plaintiff to produce an account: that the plaintiff had sole and exclusive use of the house, whereas the defendant is a registered co-owner and had paid substantially towards the purchase of the house. Now, as the defendant, as I have shown earlier, has failed to show to the court, *inter alia*, that the plaintiff had prevented her from occupying the house, this relief claim must also be dismissed (and for the same reason, I am also dismissing the alternative prayer that the plaintiff pays to the defendant one half of the value of the property in consideration of the defendant transferring her half undivided share in the property to the plaintiff).

[50] In this case, I am of the similar view with the learned judge that assuming for a moment that I have such power, the question that needs to be asked is: what is the reason for the plaintiff asking for such a relief? It would appear that the reason for seeking the sale order as appears in the plaintiff's witness statement WSPW 1 at Q&A no. 27 is that he has been deprived of the use of his 1/2 shares in property 1. The plaintiff is a registered co-owner of property 1, whereas the defendants have 1/6th shares in the same property.

[51] The evidence by the fifth defendant in his witness statement WSDW 2 at Q&A no. 10 said that the plaintiff had moved out from the said property to follow his wife after the wife had some misunderstanding with his deceased mother. Further at Q&A no. 17 and

20, he said that the house is always regarded as a family house where prayers were held and Deepavali and Ponggal were celebrated by the whole family. It was also the wish of their deceased mother to see the whole family whom she had brought up is united in the said house. This is supported by the statement by the third defendant in his WSDW 1 at Q&A no. 17 and both DW 1 and DW 2 said that all the defendants would never let the house be sold because no amount of money could replace their precious home where they have lived and grew up by their deceased mother. The third defendant, in his evidence said that the plaintiff is an opportunist and greedy.

[52] The said house being regarded as the family house with fond memories and for formal celebrations could have been a considered factor that it should not be sold or parted with. However in *Yap Miew Sang*, the question that needs to be asked is: what is the reason for the plaintiff asking for such a relief? If the plaintiff failed to show to the court, *inter alia,* that the defendants had prevented him from occupying the said house, his relief claim is dismissed as what happened in that case. In this instance case, there is no evidence from the defendants that they had never prevented the plaintiff from occupying the said house. On the contrary, the plaintiff in his police reports at pp. 92 to 95 of common bundle of documents "B1" had alleged that his brothers, the defendants had attacked him with weapons and threatened to harm him when he visited the said house. The plaintiff had wanted to stay in the said house but was warned by the defendants that they will finish him if he comes back to the said house. These police reports were never disputed by the defendants. In fact through cross-examination by the defendants' solicitor on police report dated 29 August 2004 at p. 92, it was confirmed that the fight occurred during the 16th day prayer of his late mother. In view of these facts, it is my considered opinion that the defendants had prevented the plaintiff from occupying the house or deprived him of the use of his 1/2 shares. Therefore, the relief claim by the plaintiff ought to be allowed.

Whether The Third, Fourth And Fifth Defendant Could Provide Particulars For The Rental Collected?

[53] Although the fifth defendant admitted that the three rooms in the said house were rented out initially at RM750, later the fifth defendant were not able to let out the first property due to the interference by the plaintiff and has not rented out the rooms in property 1 and secondly because most prayers and other celebrations are done in the said house, all the defendants had agreed that it was not appropriate for the rooms to be rented out. This evidence can be found in WSDW 2 at Q&A no. 17 of the fifth defendant.

[54] The plaintiff in his witness statement WSPW 1 at Q&A no. 23 said that the three rooms were rented out by the fifth defendant and had been collecting a rental of approximately RM900 per month since September 2004. However, I found that the plaintiff was unable to prove his claim on the balance of probabilities that the rooms were rented for RM900 per month since September 2004.

[55] Therefore, there are no particulars that could be provided under this prayer.

Whether The 1/2 Shares Registered Under The Plaintiff's Name In Property 1 Is Held In Trust For The Defendants

[56] It is not disputed that property 1 is registered under the name of the plaintiff for 1/2 shares and his late mother Nagamah a/p Palsamy also for 1/2 shares. The plaintiff is the administrator of his late mother's estate. The equal distribution amongst the brothers and sister, each will get 1/6 shares of the property including the plaintiff (see Land Title at pp. 58-60 of the common bundle of documents "B1").

[57] Plaintiff has valued the price of the property at RM380,000 and is ready to sell his 7/12 shares at the price of RM230,000 or buy the defendants shares at the price of RM28,000 for each shares.

[58] The defendants on the other hand disputed the plaintiff ownership of the 1/2 shares in the said property. It was contended that plaintiff had agreed to divide the shares of the whole house equally.

[59] The defendants alleged that the plaintiff is the trustee to all the defendants. It was further alleged that the payment of the said property was paid by their late mother using the compensation money of their late father and also from the salaries of the plaintiff, first defendant and the third defendant. The house is a family house.

[60] In the Land Title, there is no mention of any endorsement at the registered name of the plaintiff (1/2 shares) as "Pemegang Amanah" (As Trustee).

[61] It is trite law is this country that lands are governed by the National Land Code 1965 (Act 56). Section 340(2) of the Code clearly states that the title and interest of any such person or body shall not be indefeasible.

[62] In *Teh Bee v. K Maruthamuthu* [1977] 1 LNS 134; [1977] 2 MLJ 7, the Federal Court at p. 7 para. D and E held that:

(2) The fact that the register document of title was in the name of the appellant was conclusive evidence that the title to the land was vested in the appellant; and

(3) Under the Torrens System the register is everything and it would be wrong to allow an investigation as to the right of the person to appear upon the register when he holds the certificate of title.

[63] In *Cahaya Ideal (M) Sdn Bhd v. Orang-Orang Yang Mengenali Diri Sebagai 'Ponga' & Ors* [1999] 3 CLJ 257 at p. 277, the court held that:

> Once the plaintiff became registered as the proprietor of the property, the title became indefeasible under s. 340 of the NLC and the plaintiff has a title which was free of all adverse claims or encumbrances not noted on the register.

At p. 278, the court decided that:

> The court in *Majlis Amanah Rakyat (MARA) v. Tam Seek Hong & 54 Ors* [1994] 3 CLJ 64; [1994] 2 AMR 25.
>
> > Under our Torrens System the register is everything.
> >
> > Upon registration, the party in whose favor the registration has been effected will obtain an indefeasible title to or interest in the land (s. 340(1) of the National Land Code), that is, a title or an interest which is free from all adverse claims or encumbrances not noted on the register. I might as well mention that registration under the National Land Code is affected when a prescribed memorial of the dealing is made on the register document of the title under the hand and seal of the registering authority (*Mohammad bin Buyong v. Pemungut Hasil Tanah Gombak & Ors* [1981] 1 LNS 114; [1982] 2 MLJ 53)
>
> and clearly the plaintiff was entitled to hold the property free from all adverse claims or encumbrances not stated on the register or document of title …
>
> Raja Azlan Shah CJ Malaya (as His Majesty then was) in *PJTV Denson (M) Sdn Bhd & Ors v. Roxy (Malaysia) Sdn Bhd* [1980] 1 LNS 55; [1980] 2 MLJ 136 aptly said that "the concept of indefeasibility of title is so deeply embedded in our land law that it seems almost trite to restate it".
>
> … Perhaps the best description of the word "indefeasibility" comes from the case of *Frazer v. Walker And Others* [1967] 1 All ER 649 at p. 652 where Lord Wilberforce described it as:
>
> > … a convenient description of the immunity from attack by adverse claim to the land or interest in respect of which he is registered, which a registered proprietor enjoys. The conception is central in the system of registration. It does not involve that the registered proprietor is protected against any claim whatsoever; as will be seen later, there are provision by which the entry on which he relies may be cancelled or corrected, or he may be exposed to claims *in personam*.

> These are matters not to be overlooked when a total description of his rights is required; **but as registered proprietor, and while he remains as such, no adverse claims (except as specifically admitted) may be brought against him.** (emphasis added)

[64] In *Wong Yew Kwan v. Wong Yu Ke & Anor* [2010] 2 CLJ 703 Gopal Sri Ram JCA said as follow:

> It is to be found in the National Land Code to which she adverted in her judgment. That section immunises the title of the registered proprietor from impeachment save in the limited circumstances that are house in sub-s. (2), namely, registration that has been occasioned by fraud or forgery or by an insufficient of void instrument.

[65] The defendants pleadings did not state that registration was obtained by unlawful means or fraud. Hence, the 1/2 a shares own by the plaintiff is undisputed. By this reason, the allegations that the plaintiff 1/2 shares in the said property is held in trust of the defendants cannot hold water.

[66] From the evidence, the 1/2 shares were acquired through the purchase of the property from Maluri Sdn Bhd. The allegations by the defendants that at the time when the property was bought, they were minor and it was the responsibility of the plaintiff as the elder brother to enter into the sales and purchase agreement in trust of them cannot be accepted because the evidence shows that when the property was bought in 1980, the defendants especially the fifth defendant was not a minor.

[67] There is also allegation by the defendants that the property was bought by using the compensation money of their late father. The allegation is not supported by any sufficient evidence. The compensation money of their late father was not enough to buy a house. On record at p. 3 of common bundle of documents "B1" shows their late father's pension was only RM277 which their late mother received after the death of their father.

[68] Based on this evidence, it can be inferred that their late mother was also not in a strong financial position to buy the house. Plaintiff's evidence is cogent in that being LCCE Diploma holder, he has a fixed job at Fitzpatrick and did some temporary jobs at Selangor Turf Club and accounts works for private companies. He earned around RM3,000 per month.

[69] From the evidence, it is most likely that the plaintiff is the one who has paid for the housing loans to the bank. Since the late mother was staying with him, his evidence that the other 1/2 shares were put under her name is something which is not unreasonable expected or believes.

[70] From the documents, I am satisfied that there are sufficient evidence to support that the house was bought under the plaintiff's name and his late mother (see pp. 19-57 common bundle of documents "B1").

[71] I am also satisfied that all instalment payments to the bank were made by the plaintiff (see pp. 83-89 common bundle of documents "B1").

[72] I am also satisfied that the defendants were unable to prove that they have contributed to the purchase of the house and its instalments payments to the bank or through their late mother.

[73] In *See Hong Chen & Sons Sdn Bhd & Ors v. M Kayveas* [2011] 1 LNS 1732 the court had held that:

> There are four different types of trust. These being express trust, implied trust, resulting trust and constructive trust. The three essentials of a valid trust are:
>
> (a) Certainty of words;
>
> (b) Certainty of subject; and
>
> (c) Certainty of object.
>
> (See the case of *Yeong Ah Chee v. Lee Chong Hai & Anor And Other Appeals* [1994] 3 CLJ 20; [1994] MLJ 14 at 624.)
>
> 11. The distinction between an express trust and a constructive trust is relevant when having regard to the respondent's pleaded case and the evidence of its principal witness PW1. An express trust has been defined to be one:
>
> (i) Created consciously by the absolute owner of the property either declaring himself to be trustee of the property for identified beneficiaries, or declaring that some other person is to be trustee of the property for identified beneficiaries and then transferring legal title in the trust property to those trustees (see *The Law of Trust* by Geraint Thomas and Alastair Hudson 2nd Edition p. 19). By contrast, a constructive trust is imposed by operation of law, that is to say, it overrides the intention of the parties. (See *Perman Sdn Bhd & Ors v. European Commodities Sdn Bhd & Anor* [2005] 4 CLJ 750).

[74] In *Sri Alam Sdn Bhd v. Rasa Rata Sdn Bhd* [2011] 1 LNS 804, the court at p. 9 held that:

> Under existing law a resulting trust arises in two sets of circumstances: (A) where A makes a voluntary payment to B or pays (wholly or in part) for the purchase of property which is vested either in B alone or in the joint names of A and B, there is a presumption that A did not

> intend to make a gift to B: the money or property is held on trust for A (if he is the sole provider of the money) or in the case of a joint purchase by A and B in shares proportionate to their contributions.

At p. 12, the court citing *Pathma Naganather & Anor v. Nivedita Nagather (No. 1)* [2003] 8 CLJ 457 held as follows:

> … An implied trust arises where circumstances prevailing require the law to presume that a trust was intended to be in existence despite the absence of specific language creating an express trust. A unique example of such a trust would be a resulting trust. In essence a resulting trust arises by presumption here one party buys a piece of property and registers it in the name of a second party in circumstances where the first party has supplied the money for the purchase. In this way the registered proprietois presumed to hold the property on trust for the person who has supplied the money for the purchase.

[75] In *Tay Choo Foo v. Tengku Mohd Saad Tengku Mansur & Ors and Another Appeal* [2009] 2 CLJ 363 at p. 415; [2009] 1 MLJ 289, the court held that:

> Thus we have repeatedly held that, when one person contributes towards the purchase price of a house, the owner holds it on a constructive trust for him proportionate to his contribution, even though there was no agreement between them, and no declaration of trust to be found, and no evidence of any intention to create a trust.

[76] The decision in the above cases do not support the defendants' case. From the evidence, I am also satisfied that the 1/2 shares of the house registered under the plaintiff's name is not held in trust for the defendants.

[77] Neither s. 320 of the National Land Code operates for the fifth defendant if the court were to accept his evidence that he was a minor and the sales and purchase agreement was intended to include him. Otherwise a registrar's caveat may be entered to protect his interest. Section 320(1) provides:

> (1) Subject to sub-section (2), a registrar's caveat may be entered in respect of any land wherever such appears to the registrar to be necessary or desirable:
>
> (a) For the prevention of fraud or improper dealing; or
>
> (b) For protecting the interest of:
>
> (i) …
>
> (ii) Any person who is in his opinion under the disability of minor …

[78] On the balance of probabilities, the plaintiff has proven his claim that the 1/2 shares in the property belong to him and the other 1/2 shares which is under the deceased mother's name is the estates property which is bound to be distributed equally amongst the defendants and the plaintiff. The plaintiff eventually will own 7/12 shares in the said property and being the holder of the largest shares; he should not be prevented from occupying the said house or deprived him of the use of his 1/2 shares and 1/6 shares from his late mother's estate.

Conclusion

[79] In this case, it is quite unfortunate for the plaintiff that earlier on I have declared his action as nullity and the claim is dismissed. Had this court not found it as such the plaintiff's claim is allowed. This court is bound by the decision of the Court of Appeal in *Yong Siew Choon v. Kerajaan Malaysia* [2003] 2 CLJ 106; [2003] 2 MLJ 150.

[80] Plaintiff's claim is dismissed with cost.